***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

— IN THE —

# Court of Appeals of the District of Columbia.

OCTOBER TERM, 1905.

No. 1555, 362

Special Calendar No. 5.

THE UNITED STATES ON THE RELATION OF WILLIS C. WEST, Appellant,

*vs.*

ETHAN A. HITCHCOCK, Secretary of the Interior.

## BRIEF FOR APPELLANT.

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## Brief for Appellant.

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### The Pleadings and Judgment.

This is an appeal from an order of the Supreme Court of the District of Columbia denying a writ of *mandamus* to compel the Secretary of the Interior to approve the selection by the appellant of a certain tract of land in the Wichita Reservation, in the Territory of Oklahoma. The appellee demurred to the original petition, and the demurrer was sustained by the Court below, from which order the appellant appealed to this Court, and the judg-

ment of the Court below was reversed (19 Appeals, D. C., 333). The appellee then filed an answer in the Court below (Rec., p. 10), and the appellant moved for the issuance of a peremptory writ, notwithstanding the answer, and the motion was denied (Rec., pp. 12, 13). The appellant then demurred to the answer, and the demurrer was overruled (Rec., pp. 13, 14). The appellant then traversed the return by four separate pleas, to which the appellee in turn demurred. The Court overruled appellee's demurrer to the first plea, and sustained it to the second, third and fourth (Rec., pp. 14–16). Appellee then joined issue upon the first plea; evidence was presented by both parties and the case submitted to the Court without a jury (Rec., p. 23). The Court rendered a judgment denying the writ, and from that judgment this appeal is taken (Rec., pp. 16, 17). The material allegations of the petition are as follows:

## The Petition.

On June 4, 1891, an agreement was made between the Wichita tribe of Indians and the United States, by which the said tribe ceded its lands to the United States. Out of these lands, however, there was first to be allotted to each member of the tribe, native and adopted, not to exceed 1,060, a tract of 160 acres. The appellant was one of the signers of this agreement for and on behalf of the tribe and as a member thereof, and the agreement was ratified by the Act of Congress, March 2, 1895 (28 Stat. L., 876, 910). The agreement provided that the native and adopted members of the tribe in the selection

of their lands were to take tracts one-half of which should be arable and the other half grazing lands. It provided that certain areas should be set apart for public purposes; that within these areas selection might not be made except by those members of the tribe who had previously improved lands therein. It gave to every member of the tribe the undisputed right to select for his allotment the tract on which he had made improvements, no matter where it was situated. It provided that after the tract had been selected and taken and approved by the Secretary of the Interior, the United States should hold the lands in trust for the allottee for the term of 25 years, at the end of which time the allottee (or his heirs) was to be vested with an indefeasible title. The lands remaining after the allotment were to be open to settlement under the homestead laws of the United States. The number of the members of the tribe and its affiliated bands, native and adopted, entitled to allotment will not exceed, but will fall below, one thousand and sixty.

The appellant is a white man, over the age of 21 years, a citizen of the United States and resident in the Wichita Reservation in Oklahoma. Long prior to 1891 he married a woman who was by blood a member of the Wichita tribe. By reason of this marriage he became an adopted member of the tribe according to its established usages and customs, and, since his marriage, has been continuously recognized as such by both the tribe and the United States authorities. At the time of the negotiation of the agreement hereinbefore referred

to, the tribe, in council assembled, formally and solemnly adopted and recognized the appellant as a member of the tribe, and he then signed the agreement referred to.

Again, on May 21, 1901, in the presence of the agent of the tribe, the appellant was by the tribe formally confirmed and recognized as an adopted member. Prior to that date the appellant had been enrolled for and regularly paid his *per capita* share of the tribal funds, at the same time and in the same manner as his fellow tribesmen were paid, and had been enrolled on the census roll of the tribe by the United States Indian agent as a member thereof. After the making of the agreement of June 4, 1891, the appellant duly selected 150 acres of land, more particularly described in the petition, being a tract upon which he had made valuable and permanent improvements, and in all other respects subject to selection by him. He made application to the Secretary of the Interior for the approval of this selection and the Secretary declined to approve it.

The reservation was opened to settlement on the 6th day of August, 1901. On the day preceding this appellant filed in the Supreme Court of the District of Columbia a petition for a writ of *mandamus*, alleging, among other things, that by reason of the location and the improvements thereon the tract selected by appellant would be entered by some one entitled to enter land after the provision for the opening of said land for settlement went into effect.

## The Answer and Plea.

The appellee in his answer does not deny a single fact set up in the petition. His defense is contained in the statement that at the time of the application of appellant to him he had no knowledge respecting him, either as to his nativity or adoption as a member of the Wichita tribe, and has obtained no knowledge since on said subject, except such as was obtained in the course of his official examination and consideration of the application for allotment with the view to its approval or disapproval, and in order to properly discharge his duty in the premises the Secretary of the Interior examined and considered the said application and all evidence and proofs presented by or on behalf of the appellant; and also such other evidence and proofs bearing thereon as were embodied in the public records and files in the Indian Bureau and in the Department of the Interior; and upon consideration of all such evidence and proof the Secretary did, on July 3, 1901, reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment in the premises, and he therefore denied his application for the same. (Rec., pp. 10, 11.)

The plea of appellant upon which the appellee joined issue was in these words:

> Relator says that the defendant, as Secretary of the Interior, did not, by the decision alleged in the

answer to have been made by him on July 3, 1901, decide that the relator was not by nativity or adoption a member of the Wichita or affiliated band of Indians, and for that reason denied him the said allotment. (Rec., p. 14.)

## Appellant's Evidence.

Appellant submitted in evidence, in support of this plea, a copy of the decision of the Secretary of the Interior, referred to in the answer (Rec., pp. 23–25), which does not decide that appellant is not a member of the tribe. It is silent in relation to the usage and custom of the tribe with reference to white men married to its women, and it does not refer to any adoption by the tribe save one. It recites that by vote of the council on May 21, 1901, 34 in favor, 5 opposed; chiefs, 5 in favor, 2 opposed, appellant was formally adopted into the tribe, and decides that notwithstanding this adoption appellant's application for enrollment by adoption with the Wichita tribe is denied.

## Appellee's Evidence.

Appellee submitted in evidence a letter from D. M. Browning, Commissioner to the Secretary of the Interior, dated June 7, 1895 (Rec., p. 27), the material recital of which is are follows:

On January 23, 1893, a Mrs. Purdy applied to the Department for an allotment of land with the Kickapoo Indians, which was denied. On December 9, 1893, the then acting Indian agent of the Kiowa agency transmitted to the Department the proceedings of a council

of the Wichita, Caddo and affiliated bands of Indians, adopting Mrs. Purdy and three other persons named Purdy. On the same day, the Department requested from the Indian agent further information in regard to this adoption. On February 20, 1894, the successor of this agent was informed that these members of the Purdy family and several other white persons, among whom appellant's name does not appear, had been reported to the Department as having been adopted by the tribe. The agent under date of February 19, 1894, had transmitted to the Department certain papers, apparently the proceedings of councils with the Wichita, Caddo and the affiliated tribes of Indians, in which they asked permission to adopt into their tribe certain persons, 29 in number. The reason for the adoption of 13 of the white persons was that they had "married our daughters, and in so doing had become our sons and a part of our people." This adoption was not immediately acted upon, but the agent was instructed that the Indians should fully understand before passing upon the question of the adoption of the 29 people referred to that for "every allotment taken in excess of 1,060 a reduction will be made for the purchase price paid them for each allotment taken in excess. (Rec., p. 30.) On April 8, 1895, the acting Indian agent reported to the Department that on February 21, 1895, he called a council of the Wichita and affilated bands of Indians, at which the matter of adoption was carefully explained to them, and at which there were 35 Indians present, and voting upon the names of persons submitted to them for adop-

tion they rejected, among others, appellant—13 ayes, 17 nays. (Rec., p. 31.) Appellant objected to the admission of this letter in evidence and excepted to the ruling of the Court admitting it.

Appellee also submitted a letter from A. C. Tonner, acting commissioner to the Secretary of the Interior, dated April 18, 1901 (Rec., p. 32), of which the material recitals are as follows;

The Department had received a letter from William C. Shelley, attorney at law, submitting the application of appellant for correction of the Wichita tribal rolls to the end that he may be enrolled as a member of the tribe. Mr. Shelley said that appellant married a Wichita woman February 16, 1891 (Rec., pp. 33–35), and was duly recognized as a member of her tribe according to its usages and customs. He signed the agreement of June 4, 1891. His name was upon the roll of *per capita* payments made to the tribe in March, 1894—the first roll for such payments—and also appears on similar roll of 1895. In the early part of 1895 some parties interested in getting their names on the rolls of the tribe caused a council of the Wichita and affiliated bands of Indians to be held, at which the names of some 29 persons were submitted for admission, among them being the name of appellant, which was submitted without his knowledge or consent. On February 7, 1898, appellant was stricken from the rolls (Rec., pp. 33–34.) Mr. Shelley's letter was submitted to the Indian agent, who on March 15, 1901, reported to the Department fully corroborating Mr. Shelley's statements (Rec., p. 34).

On April 6, 1901, the agent reported to the Department that on April 5, 1901, he had called a council of the chiefs and headmen of said tribe and asked them the straight question—"had they ever considered a white man who had married into their tribe entitled to become a member?" That each of the chiefs and headmen made separate reply, and stated that they had never considered a person married into their tribe entitled to be enrolled as a member until he had been voted upon and was elected by a majority of the male members of their tribe. They were then asked if they considered Willis West as a member, to which he replied that they considered his case the same as the others, and that he was only entitled to be enrolled by formal adoption, the same as other persons who had married into that tribe, and that they would now like to have his adoption approved, as voted for at the council of March 23, 1897 (Rec., p. 36). On March 23 and 24, 1897, the tribe had held a council in which the question of adoption of appellant was brought up and voted upon, which vote resulted in 92 in favor of appellant and 24 opposed (Rec., p. 37). The appellant objected to the introduction of this letter and excepted to the ruling of the Court admitting it.

The appellee also introduced in evidence certain regulations of the Internal Revenue Department, purporting to govern the adoption of persons into Indian tribes. The regulation in effect up to December 28, 1893, contained no provision that the adoption should be approved by the Department (Rec., p. 25–26). On De-

cember 28, 1893, a regulation was adopted containing this provision, which was repeated in a regulation adopted March 1, 1904 (Rec., pp. 26–27.) The appellee objected to the introduction of these regulations, and excepted to the ruling of the Court admitting them. The appellee also introduced several letters, none of which have any specific reference to the case of appellant, but are supposed by counsel to have been offered for the purpose of showing that at least in the cases to which they pertain the Department had exercised the right to approve or disapprove of an adoption. The appellant objected to the admission of these papers set out in the record from pages 40 to 46, inclusive, and excepted to the ruling of the Court admitting them.

## Assignment of Errors.

The appellant says that the Court below erred—

1. In not issuing a peremptory writ, notwithstanding the answer.

2. In overruling the appellants's demurrer to the answer.

3. In sustaining the appellee's demurrer to the appellant's second, third and fourth pleas.

4. In admitting the evidence submitted by the appellee.

5. In denying the writ of *mandamus*.

## The Motion for Issuance of the Writ and the Demurrer.

The appellant contends that the motion for a writ, notwithstanding the answer or the demurrer to the

answer, should have been allowed or sustained by the Court below. These two forms of pleading seem in most jurisdictions to perform the same function. (Silverthorn *vs.* Warren R. Co., 33 N. J. L., 173; *ex parte* Newman, 14 Wall., 152.) If there is any distinction between them it is that where the motion for the writ is granted the respondent has no opportunity to amend and cure the defects of his return. If the demurrer is sustained this opportunity may be afforded him. Fearing that the Court might hold that the return was defective, simply because it was not full enough, the appellant deemed it wiser to demur also. The reasons for granting of the motion and for sustaining the demurrer are the same, and they will be considered together.

On the former appeal of this case (West *vs.* Hitchcock, 19 App. D. C., 333) this Court decided that the duties of the Secretary in this case, as shown by the petition for the writ, were purely ministerial.

In opposition to this proposition the trial judge cites in his opinion the case of Riverside Oil Company *vs.* Hitchcock (190 U. S., 316). We submit that that case is essentially different from the case at bar. That was a case where the Commissioner of the Land Office and the Secretary of the Interior had refused to approve the selections of land made by the petitioner in that case in lieu of certain lands previously surrendered by him to the United States, by reason of their lying within the limits of a forest reservation. In that case several disputed questions were submitted to the Department, for the solution of which the judgment and discretion of

the Secretary and the Commissioner were necessary. It was an open question whether the lands selected were vacant at the time of the selection; it was a question whether or not they were mineral lands; and there were other questions calling for the exercise of departmental discretion.

Mr. Justice Peckham, in his opinion, says:

> "Upon a perusal of the record it appears that those questions are not merely formal ones, nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted to the Land Department, which had full and complete jurisdiction over the matters arising under the act of June 4, 1897, and it thereby became the duty of the officers of that Department to decide them. * * * Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial function, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.
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> "Neither an injunction nor *mandamus* will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion."

In the case at bar, conceding that the adoption of the appellant was complete, no room was left for the exercise of discretion or judgment by the officers of the Department. We concede that the case cited would have been applicable if the answer had denied the identity of

appellant or had denied the facts set up as constituting his adoption by the tribe, but in the absence of these details we contend that the petition and the answer shows that it was the plain ministerial duty of the Secretary to allot land to this appellant and to all other members of the tribe, native and adopted.

It is a well-settled principle, for which authority is scarcely necessary, that the allegations of the petition which are not denied, or which are insufficiently answered, must be held to be admitted by the respondent. The petition in this case alleges that the appellant is an adopted member of the Wichita tribe. It sets out in detail the facts upon which this allegation is based. The appellant is a member of the tribe by the ancient usage of the tribe in admitting to membership those persons who are married to members of the tribe. The answer does not deny this usage and custom. The petition alleges that appellant was adopted into the tribe more than once by formal action of the tribe. He was adopted at the time of signing the agreement of June 4, 1891. He was afterwards adopted by vote of the tribe in council May 21, 1901. The answer does not deny these facts. And, as a conclusion of the matter, the petition alleges that the appellant was an adopted member of the tribe. The answer does not deny either the usage and custom or the formal adoption by vote. In the language of the Court in this case on the former appeal no denial "well could be made (of the adoption) in view of the well-established custom of the Indians for over 250 years to admit white men into membership of

their several tribes by the process of adoption, and in view of the uniform recognition of this custom by the Government of the United States." The sole defense of his conduct in denying an allotment to the appellant set up by the Secretary in his answer is contained in these words:

> He considered the said application of the relator and all evidence and proof presented by or in behalf of the relator in support of such application, including each and all of the matters set forth in the petition herein in support of such application, and also such other evidence and proofs bearing thereon as was embodied in the public records and files of the Indian Bureau and in the Department of the Interior, and upon full consideration of the said application of the relator and of all such evidence and proofs this defendant, as Secretary of the Interior, did on the 3d day of July, 1901, reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians.

This answer must be held by the Court to be an admission that the averments of the petition as to the adoption are true.

> Creager *vs.* Hooper, 83 Md., 490; People *vs.* Ovenshine, 41 How. Pr. (N. Y.), 164; People *vs.* Crab, 156 Ill., 155.

If the averments are true there was nothing before the Secretary upon which he could decide that appellant was not an adopted member of the tribe. There was no fact about which he could exercise discretion. It was

not the official judgment of the Secretary upon a disputed question of fact. It must have been purely arbitrary conduct. If this contention is correct, the Secretary has failed in the performance of a mandatory duty imposed upon him by the statute, and the writ should have issued without further proof upon the part of the appellants.

## Argument Upon the Evidence.

The evidence offered both by the appellant and the appellee after the denial of the motion for the issuance of the writ and after the demurrer was overruled, fully sustains the allegations of appellant's petition, and equally disproves the return of the Secretary that he did "reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment under the agreement so ratified." The decision itself shows that appellant was married to a Wichita woman and that he was by vote of the council of May 21, 1901, adopted into the tribe. It does not show that the Secretary decided that appellant had not been adopted into the tribe. It does show that the Secretary denied the application of Willis C. West for *enrollment* in the tribe by the Indian Office for the purpose of receiving an allotment of land. The Secretary was not asked by appellant to decide whether he had ever been adopted into the tribe by usage and custom, or by formal tribal action. The only question that was before him was

whether or not appellant should receive an allotment of land, and the only question that he decided was that appellant should not receive such allotment, and he decided this, although he admitted in the same decision that appellant had been adopted into the tribe by formal action, and had married a Wichita woman. (Rec., pp. 24, 25).

Neither the petition nor the decision refers to another adoption of appellant by formal action of the tribe and to his rejection in the same manner. The letter of Commissioner Browning to the Secretary shows that prior to February 1, 1895, certain persons submitted 29 names to the tribe for adoption. Out of a membership of something like a thousand only 35 were present, and only 30 voted upon the name of Willis West, 17 against him and 13 for him. The attention of the Court is especially directed to the proceedings disclosed by that letter as leading up to this vote upon the name of appellant. (Rec., pp. 30, 31.) Although, as shown by all the rest of the evidence in the case, there was no danger that the number of allotments would exceed 1,060, the Indians were especially warned that any money allowed them by Congress would be subject to a reduction for each allotment of land taken in excess of 1,060, and it contains various other matters showing that appellant had no part in or knowledge of this council; that it was attended by few members, and seems to have been especially called for the purpose of securing the rejection of the 29 persons. This council was held February 21, 1895. In the letter of Commissioner Tonner to the Sec-

retary (Rec., p. 32) it is shown that at a council held March 23 and March 24, 1897, when a much larger number of members were present and when West himself had moved the tribe to rectify the injustice done him, he was adopted by a vote of 92 in favor and 24 opposed.

These records show that not only was appellant recognized by the tribe as a member, but his membership was also recognized by the United States in every transaction with the tribe prior to February 7, 1898, when his name was stricken from the rolls, though the record does not show that he was so stricken by authority of the Secretary. Undisturbed in his tribal membership by any one in authority appellant located his home upon the land here in question and made upon it many valuable improvements to fit it for that purpose. Secure in the knowledge of his vested rights he co-operated with his fellow-tribesmen and the officers of the United States in the negotiation of the agreement which added a very large area to the public domain and rendered more satisfactory the relations between his tribe and the Government. So long as his services in negotiating the agreement were necessary and his signature to it was desirable, his title to tribal membership was clear and strong enough to satisfy the most jealous guardian of the Indian Office. It was only when the need for him had passed that it was discovered by the Interior Department that it was the function of the Secretary and not of the tribe in council to determine who was and who was not of its membership.

Appellee against appellant's objection submitted sev-

eral papers, showing that at times the Secretary has exercised this function, though, so far as this record shows, only once prior to September 8, 1900 (Rec., pp. 39 to 46), and though the regulations of the Department contained no provision for this approval until December 28, 1893 (Rec., pp. 25, 26).

## The Jurisdiction of the Secretary in the Matter of Adoptions.

We know of no authority for this interference by the Secretary with the internal affairs of an Indian tribe The duties of the Secretary and the Commissioner are defined by sections 441 and 463, R. S.:

> SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
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> * * * * * * *
>
> THIRD—THE INDIANS.
>
> * * * * * * *
>
> SEC. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.

We contend that by the terms of these statutes the management and supervision contemplated to be exercised by the Secretary and the Commissioner is limited to matters pertaining to the "relations" of the tribe to the United States, and that its extension to matters per-

taining solely to the internal affairs of the tribe is not only without warrant of law, but is a gross violation of the Government's duty to the tribe and its members, and this contention has been fully sustained by the courts.

> "From the organization of the Government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descent, and the punishment for crime committed against each other."
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> Sah Quah, 31 Fed. Rep., 329.
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> "They (Indian tribes) were, and always have been, regarded as having a semi-independent position, where they preserved their tribal relations, not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, within the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the States within whose limits they reside."
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> U. S. *vs.* Kagama, 118 U. S., 375.
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> "An Indian tribe within the State, recognized as such by the United States Government, is to be considered as a separate community or people, capable of managing its own affairs, including the domestic relations, and those persons belonging to the tribe who are recognized by the customs and laws as married persons, must be so treated by the courts, and the children of such marriage can not be regarded as illegitimate."
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> Earl *vs.* Godley, 44 N. W. Rep., 254.

"By the agreement confirmed in this Act (March 2, 1889), these nations gave up a large amount of territory, and the rights conferred upon the nation or upon individuals were the consideration thereof. The persons entitled to such rights are the persons who at the time of the agreement constituted the Sioux Nation, and were lawful members thereof. The question, therefore, whether any particular person is or is not an Indian within the meaning of this agreement, is to be determined, in my opinion, not by the common law, but by the laws and usages of the tribes."

20 Opinions Att'y Gen'l, 711.

In the case of Sloan *vs.* U. S. (85 Fed. Rep., 197), where the question presented was whether Indians of mixed blood were to be considered as "Indians" in alloting lands to the members of the Omaha tribe under provisions requiring such allotments to be made to "Indians" of that tribe, Judge Shiras said:

"It confers the right to an allotment upon the Indians of the Omaha tribe. It makes no discrimination with relation to mixed bloods. It must have been well known to Congress, as it unquestionably was to the Omaha tribe, that they were residing at that time upon this reservation, as members of the tribe, many persons of mixed blood; and if it was the purpose of the parties to exclude from the benefit of the act all persons who were not Indians of the pure blood, apt words to that end would have been used."

In the case at bar, the treaty provisions is very much broader in its description of the parties entitled to allot-

ment, being for "members of the tribe, native and adopted." (Art. II.)

It was "unquestionably known" to the Wichita and affiliated bands of Indians at the time that treaty or agreement was signed, June 4, 1891, that appellant was "residing at that time upon this reservation as a member of that tribe," for, as before stated, he was so recognized by the Indians themselves, in the presence of the commission nogotiating the treaty or agreement, and, as a member of said tribe, signed the treaty or agreement in the presence of the Indians and of the Commission. Had it not been the purpose of the contracting parties (the Indians and the United States), to recognize appellant's right of membership "apt words" to exclude him from the benefits of such membership "would have been used." Instead of which we find that by the provisions of Article V he must have been counted and included as a beneficiary of the agreement.

In the case of Jones *vs.* Mehan (175 U. S., 1) the treaty between the Chippewa Indians and the United States contained a provision setting apart a reservation of 640 acres to Moose Dung, chief of the tribe, who entered into possession of the same. Some years afterwards, dying, his son, also named Moose Dung, entered into possession as his only heir, being the oldest son of his father by his first marriage, and entered into some leases with certain white persons, which, subsequently, becoming a matter of contest, involved the rights of others claiming as heirs; and a sum of money being in the hands of the Indian Department as rental of a part of said lands, the

Commissioner of Indian Affairs directed the Indian agent for the Chippewa tribe to "fully investigate the subject as to who are the legal heirs of old chief Moose Dung, for the purpose of ascertaining to whom rent should be paid." The agent made such investigation, and reported certain six descendants of old chief Moose Dung were his only living heirs, and entitled to share equally in his estate. The Commissioner forwarded this report to the Secretary of the Interior, recommending that these six persons be determined to be the heirs of old chief Moose Dung, and the Secretary of the Interior, concurring in the recommendation, returned the papers, whereupon the Commissioner directed the Indian agent to distribute the proceeds of the lease in his hands in accordance with that decision. The court said:

> "The Department of the Interior appears to have assumed that, upon the death of Moose Dung, the elder, in 1872, the title in his land descended by law to his heirs generally, and not to his eldest son only. But the elder chief Moose Dung, being the member of an Indian tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages and customs of the tribe, and not by the law of the State of Minnesota, nor by any action of the Secretary of the Interior."
>
> "An Indian tribe is a separate organization, with their own laws and customs."
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> Stephens *vs.* Cherokee Nation, 174 U. S., 445.

Some time previous to 1830, Smith, who was a white

man, intermarried with Eliza, who was an Indian woman of the Choctaw Nation. After marriage they continued to reside in the same Nation on the lands described in the bill, guaranteed by the 19th article of the treaty of Dancing Rabbitt Creek, concluded in 1830, which provides that each head of a family who cultivated 30 acres of land during the year 1830 should have three quarter sections of land, including improvements, etc. Smith located the lands in the names of himself and wife, and in 1835 sold the same to Hall, from whom the appellee derives title. The Court said :

> "It is unquestionably true that the treaty has reference to the head of a family living under the dominion of the Choctaw Nation; but the treaty does not say that a white man may not, according to the usages and customs of that Nation, be the head of a family. When a white man marries a woman who was a member of the Indian Nation, and adopted her domicile, whether he became the head of a family or not depended upon the law or custom regulating the rights of the parties in such case. And this is what we presume the treaty means when it speaks of the head of a family; one who is so in the Choctaw sense of the term, according to the usages and customs of that Nation."
>
> Turner *vs.* Fish, 28 Miss., 306.

In Senter *vs.* Choctaw Nation (MSS.), decided by Judge Clayton, of the Indian Territory, the question being as to the effect of a marriage between a white man and a Choctaw Indian woman, it is said :

> "The Court is of the opinion, therefore, that in order to confer the right of citizenship by marriage in the Choctaw Nation, the marriage must be a valid one under the provisions of the Choctaw laws."

And in the case of Tucker *vs.* Choctaw Nation (MSS.), a case where a white man married a Choctaw Indian woman under a license from the Clerk of the United States Court, and afterwards learning that said marriage did not confer upon himt he right to become a citizen of the Choctaw Nation, he remarried the same woman in accordonce with the provisions of their laws, the Court said:

> "It simply had the effect of naturalizing the party. It gave the Choctaw Nation the opportunity of inquiring into his character, which was proven good. He paid the license fees and took the oath, and fully complied with the Choctaw laws, and hence was entitled to membership in that tribe."

The last-named Choctaw cases, it will be borne in mind, were decided under the written statutes of the Choctaw Nation, their laws providing expressly for intermarriage with citizens of the United States. The Wichita Indians, it is contended, have their laws also upon the same subject, which are entitled to as much consideration by the courts, when proved. It is true such laws are unwritten, and consist in the usages and customs of the tribe from time immemorial, but they are the laws of the tribe nevertheless, and are as binding as if written, and require only to be averred and proved as other facts. (Turner *vs.* Fish, Miss., 306.)

"The indictment charged that Rutherford was a 'white man and not an Indian,' but testimony was offered for the purpose of showing that, although a white man, he had been adopted into the Cherokee Nation, which, if proved, would cost the Federal Court of jurisdiction within the rule laid down in Alberty *vs.* U. S. (162 U. S., 499). In that case it was held that the courts of the Nation have jurisdiction over the offenses committed by one Indian upon the person of another, and this includes, by virtue of the statutes, both Indians by birth and by adoption. * * * Again, it is evident that Rutherford intended to change his nationality and become a Cherokee citizen. He took the steps which the statutes prescribed, and did, as he supposed, all that was requsite therefor. He was marrying a Cherokee woman, and thus, to a certain extent, allying himself with the Cherokee Nation. * * * It appears, therefore, that Rutherford sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen, and still asserts his citizenship. Under these circumstances, we think, it must be adjudged that he was a citizen by adoption."

Nofire *vs.* 164 U. S., 657, 658, 661, 662.

See, also,

U. S. *vs.* Rogers, 4 How., 567;
Roff *vs.* Birney, 168 U. S., 218;
O'Brien *vs.* Bugbee, 26 Pac. Rep., 428;
Seneca Nation *vs.* Lemley, 8 N. Y. S., 345.

## Departmental Construction.

The Commissioner of Indian Affairs, in his Annual Report of August 27, 1892, discusses very elaborately the question, "What is an Indian?"

In that discussion, referring to the matter of adoptions, he says:

> "In the early history of America many white men were adopted into Indian tribes, and in accordance with the customs of those tribes become recognized as members and entitled to all the rights therein that the members of the Indian blood were entitled to enjoy. After the relations between this Government and the Indian tribes assumed the form which has been likened to that of guardian and ward provision was made in many of the Indian treaties for the regulation of such adoption of whites into Indian tribes, as well as for the regulation of adoption therein of Indians of different tribes, nations, or bands; and in many cases the United States has been given the right to supervise and approve or disapprove such adoption thereafter made, as the best interests of the Indian tribes would seem to demand."
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> Rep. Com. Ind. Affrs., 1892, p. 33.

From this it would appear that the authorities of the United States Government have no inherent right to sit in judgment upon the question of tribal membership, but that the tribe itself is supreme as to that question, as it is admitted to have been in the early history of America, and that such right of supervision as may now be claimed to exist, must exist alone by virtue of some

law of Congress as to that particular tribe, or some treaty between that tribe and the United States conferring such authority. In the absence of such express delegation of authority, the tribe remains sovereign, as has been shown.

Stevens *vs.* Cherokee Nation, 174 U. S., 445.

The Commissioner, in the same report, further says (p. 36):

> "Also where Congress has required a census to be taken of an Indian tribe (as in the case of the Chippewas, 25 Stats., 642), the roll of names submitted of those recognized by the Indians as members of their tribe, including half-breeds and mixed bloods, has been accepted by the Executive Departments of the Government without question as conforming to to the requirements of the Statute."

In the same report the Commissioner further says (p. 37):

> " It is also worthy of consideration in this connection that the United States Government has been, and is the trustee of vast sums of Indian money, and that it has from time to time disbursed this money by paying it *per capita* to the Indians, recognizing as indians all who are borne upon the rolls, and recognized by the Indians themselves as members of their tribes, including half-breeds and mixed bloods."

In the light of this report of August 27, 1892, and the regulations of the Indian Department (Rec., pp. 25, 26), which first provided for Departmental approval of adop-

tions December 28, 1893, the necessity for this approval would seem to be a new doctrine antagonistic to the decisions of the Supreme Court and discovered since the agreement of June 4, 1891, was negotiated and since the rights of appellant were acquired.

## Vested Rights Involved.

And we insist that the Court should not lose sight of the fact that we are dealing with the vested property rights of Individuals. Before the United States had any claim to these lands, this petitioner owned an interest therein as an adopted member of the tribe. The agreement itself declares that to those individuals who occupy the status of this appellant "there shall be allotted 160 acres of land;" and, again, that "each and every member of the tribe shall have the right to select" their lands; and, finally, that if they do not select within the time prescribed, "the allotting agent in charge of the work" shall make selections for them. In other words, the whole agreement demands that every member of the tribe have an allotment.

The vested rights of individuals are in many cases to be found in the books, the subject of most serious consideration by the courts; and their preservation has been in many instances of the allowance of the writ, one of the controlling influences.

The resulting proposition is that where rights are clearly vested, and the purpose to preserve them clearly indicated, no nicely delicate regard for what an executive claims as his prerogative shall operate to destroy, imperil,

or incumber the individual rights. If the Secretary's alleged power (which is not a power but a duty) were half so clearly defined as the individual rights of this appellant, there might be some reason for deference to the executive; but where the rights of the appellant are determined beyond possible question, as they are in this case, and the act of the executive in denying these rights defeats the law in letter and in spirit, shall not the presumption be against such power in the executive? Shall not any doubt be resolved in favor of the right which the law establishes and for the enjoyment of which it provides?

Stevens *vs.* Cherokee Nation, 174 U. S. 641.

## Conclusion.

We therefore insist—

First. That the duty of the Secretary to identify the individual as a member of the tribe does not involve judicial discretion, but we say it is not material to determine whether this was a ministerial or a judicial duty, because the answer of the Secretary and all the evidence in the case shows that he did find that this appellant had been adopted by the tribe and his only reason for refusing to approve appellant's selection of land was because he did not approve of that adoption.

Second. That the adoption being conceded, the approval or disapproval by the Secretary of the selection is not a power but a duty; that the duty to approve selections made within the requirements of the statute is a positive case; that the duty of disapproving selections

applies only to those made in violation of the requirements of the statute, and that the performance of the one duty or the other is positively defined by the provisions of the act giving to the Secretary no option whatever whether he shall approve or disapprove a selection.

Third. That the allotment of land selected does not constitute a bounty from the Government, but is a partial payment of the consideratlon for the cession of the lands of the tribe, and that the failure of the Secretary to approve this appellant's selection is a forcible abatement by that much of the consideration agreed to be paid by the United States.

With the determination of these questions in favor of the proposed allottee, then, if there ever was any judicial discretion or power vested in the Secretary, it was exhausted, and nothing remained to him but the performance of the plain duty to approve the appellant's selection. Were it otherwise, the Secretary could capriciously disapprove selections; and, to use the language of the Court in Marbury *vs.* Madison (1 Cranch., 137), "sport away the rights of the petitioner." If he were permitted to do this in one instance he might do it in all, until he had refused to approve as to the entire membership of the tribe, and in that way invalidate the act of Congress.

But when these facts, which he now admits, are determined in appellant's favor, and the Secretary's judicial functions thereby exhausted, the same obligation rests upon him to perform the ministerial duty

following upon the exercise of his judgment, as was enforced by the decree of the Court in the case of U. S. *vs.* Schurtz (102 U. S., 378) where, after once passing upon the right of the claimant to a patent, the Secretary was formally required to deliver the patent.

Into this Honorable Court comes a citizen of the United States declaring, under oath, that he is an adopted member of the Wichita tribe, and that he signed the deed which ceded the vast territory of that tribe to the United States; citing the terms of the deed and the act of Congress, specifying as the consideration to be paid to him, the tract of land upon which he has lived and erected improvements; showing that, though he has complied in every particular with the law, the Secretary of the Interior refuses to secure him his rights.

Comes the Secretary of the Interior, and denying none of these things, says, in effect, not that his own action is right, but, that right or wrong, his official position removes him from the power of the courts of his country.

If he were a private individual the specific performance of the contract would be decreed, and he would be directed to execute a deed. He is but the agent of the Government which contracted with this appellant, and which has directed him to perform its contract. Shall he be permitted to avoid that contract and work irreparable wrong upon the theory that he is beyond the reach of the courts?

It can not be denied that Congress has the power to

command that act to be done; and the power to enforce the performance of the act must rest somewhere or it will present a case which has often been said to involve a monstrous absurdity in well organized government; that there should be no remedy, although a clear and undeniable right should be shown to exist.

Kendall *vs.* U. S., 12 Pet., 62.

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